IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	)	
	)	**Case No. 10-31607**
GARLOCK SEALING TECHNOLOGIES LLC, et al.,	)	**Chapter 11**
	)	
	)	**(Jointly Administered)**
Debtors.[1]	)	

FUTURE ASBESTOS CLAIMANTS' REPRESENTATIVE'S POST-TRIAL BRIEF REGARDING THE ESTIMATION OF GARLOCK'S MESOTHELIOMA CLAIMS

[FILED UNDER SEAL]

[1] The Debtors are Garlock Sealing Technologies LLC ("Garlock"), Garrison Litigation Management Group, Ltd. and The Anchor Packing Company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Joseph W. Grier, III, the future asbestos claimants' representative (the "FCR"), through counsel, hereby submits his post-trial brief following the July/August 2013 estimation hearing (the "Estimation Hearing").

I. SUMMARY

It is the FCR's intention that this brief will assist the Court in the estimation task before it in an objective and practical manner. The brief: (i) identifies the constituency that the FCR represents – future asbestos personal injury claimants; (ii) explains the FCR's understanding of his role as an independent fiduciary in this section 524(g) case; (iii) discusses the scope of the Court's Order for Estimation of Mesothelioma Claims (the "Estimation Order"); (iv) narrows the scope of the estimation; (v) provides the FCR's estimate of the amount of money required to resolve Garlock's mesothelioma claims, exclusive of defense costs and liquidated and disputed prepetition settlements; (vi) explains why the FCR's estimate is reliable, reasonable and conservative; (vii) demonstrates how Garlock's merits-based prepetition payments to mesothelioma claimants are a proper source for the Court's estimate of the amount of money required to resolve such claims; and (viii) responds briefly to Garlock's criticisms of the FCR's estimation expert, Dr. Francine F. Rabinovitz. Where applicable, this brief contains detailed cites to the record to assist the Court in its review.[2]

[2] The transcript of the Estimation Hearing is referred to as "Tr." herein. The FCR filed his List of Exhibits and Designated Deposition Testimony for the Evidentiary Record on Estimation of Mesothelioma Claims on this date. The FCR further joins the Objections of the Official Committee of Asbestos Personal Injury Claimants (the "ACC") to certain of Garlock's exhibits, deposition designations and offers of proof, which the FCR understands will be filed as an appendix to the ACC's Post-Hearing Brief.

II. FUTURE ASBESTOS CLAIMS AND ROLE OF FCR

A. The FCR's Constituency: Future Asbestos Claims

Garlock and its predecessors manufactured and sold asbestos-containing industrial sealing products throughout the United States and other countries from the beginning of the twentieth century all the way through the turn of the twenty-first century.[3] Garlock's products, which ranged from small cans of asbestos packing to rolls of gasket material, were used in many different settings, including pipes, boilers, engines, and valves, and were sold to a full gamut of customers in a variety of industries, including shipping, oil, chemical, steel, mining, and water treatment.[4] The products, which were often stamped with Garlock's name and logo, were so ubiquitous that the term "Garlock" was synonymous with gaskets; they were the "Kleenex" of their market.[5] Workers in numerous occupations would have used Garlock's products, including

[3] Defendant Garlock Sealing Technologies LLC's Responses to Plaintiff's Interrogatories and Requests for Production to Defendants, Kilburn v. A.T. Callas Co. ("Garlock's Discovery Responses (Kilburn)"), at GST-EST-0108978 (ACC-68) ("[Garlock's] last asbestos-containing gasket sale is believed to have been in early 2001."); see also Information Brief of Garlock Sealing Technologies LLC, dated June 7, 2010 (Dkt. No. 24) ("Garlock Information Brief"), at 1-2, 10-12, 20 ("By 2001, Garlock had found substitutes for most industrial applications of asbestos gaskets and packing."). That manufacturing history explains why Garlock is subject to asbestos-related claims not because, as Garlock suggested at trial, its products were used in proximity with other asbestos-containing products such as asbestos insulation. (Tr. 1392:21-1393:24, 7/26/13 PM (Magee) ("[T]he principal reason why Garlock was sued [was] that its product was there in the environment where the dangerous asbestos insulation was.").)

[4] See Garlock's Discovery Responses (Kilburn), at GST-EST-0108978 (ACC-68) (discussing types and uses of Garlock products).

[5] Tr. 114:14-19, 7/22/13 PM (ACC Opening) ("'In fact, Garlock's marketing department was so successful in its branding efforts that certain kinds of industrial gaskets were often called 'Garlocks' in the same way that Kleenex or Jello are commonly used words in place of facial tissues or gelatin dessert.'") (excerpting from Dr. Bates' report).

pipefitters, boilermakers, plumbers, and millwrights.[6] The products largely contained chrysotile asbestos; some contained the more toxic crocidolite asbestos.[7]

Garlock faces massive asbestos liabilities, namely thousands of claims filed by individuals alleging injury from Garlock's asbestos containing products. Thousands more will be filed in the future. Garlock's expressed goal is to address those liabilities by reorganizing under the auspices of section 524(g) of the Bankruptcy Code, such that all present and future asbestos claims against Garlock and its parents, Coltec Industries Inc. ("Coltec") and EnPro Industries Inc. ("EnPro"), will be enjoined and channeled to a trust.[8]

Section 524(g) requires the appointment of a legal representative for future asbestos claimants prior to the issuance of a channeling injunction. 11 U.S.C. § 524(g)(4)(B)(i). To that end, on Garlock's motion, the FCR was appointed by this Court to represent the interests of the holders of future asbestos personal injury claims against Garlock.[9] The Appointment Order defines "future asbestos claims" as "claims based on, arising out of, or related to asbestos-related injury, disease, or death that has not manifested, become evident, or been diagnosed as of the

---

[6] See Tr. 834:3-836:11, 7/25/13 AM (Henshaw) (identifying occupations where individuals were likely exposed to gaskets and packing).

[7] Tr. 1468:18-25, 7/29/13 AM (Longo) ("Q. And are you familiar with the asbestos content of Garlock asbestos sheet gaskets? A. I am. Q. And what was generally the content of those particular materials? A. They're generally around 70 to 80 percent by weight of asbestos, either chrysotile or the specialty gaskets, crocidolite."); Garlock's Discovery Responses (Kilburn), at GST-EST-0108978 (ACC-68) ("From 95% to 98% of Garlock's asbestos-containing products were made only with chrysotile asbestos fibers.").

[8] Tr. 3104:18-3105:2, 8/5/13 PM (Magee) ("Q. Now part of what you want is a 524(g) injunction for EnPro; right? A. That would be our preference. Yes. Q. So, putting aside Garlock for a minute, no one could sue EnPro anymore in the future in anything that related to asbestos. A. That would be our goal. Yes. Q. And you would want the same thing for other Garlock affiliates; right? A. That would certainly be our goal. Yes."); see also Garlock Information Brief, at 84 ("The debtors (and the related parties) will then be protected by an injunction that will channel all current and future asbestos claims to a trust.").

[9] Order Granting Debtors' Motion for Appointment of Joseph W. Grier, III as Future Claimants' Representative, dated Sept. 16, 2010 (Dkt. No. 512), ¶ 2.

date an order is entered confirming a plan of reorganization in these cases."[10] This language, and the structure of section 524(g), reflects the fact that asbestos-related diseases, such as mesothelioma, have long latency periods, up to 35 years or more in many instances.[11]

Given Garlock's extended history with asbestos and the long latency of asbestos-related diseases, many future asbestos claims will be based on prepetition exposure to asbestos in Garlock's products and, therefore, are formally categorized as "claims" under prevailing bankruptcy law.[12] Although they disagree as to scale, each party's estimation expert predicts that the FCR's clients represent more than 75% of all asbestos claims.[13] All the parties agree that future asbestos claimants, as a group, are by far the largest creditor constituency in the case.

---

[10] Id.

[11] See, e.g., Tr. 356:2-5, 7/23/13 AM (Garabrant) ("Q. . . . [Y]ou would agree with me that the average latency period for somebody exposed to asbestos is about 35 years? A. Yes, or slightly longer."); Tr. 469:15-18, 7/23/13 PM (Sporn) ("Q. But if I were to say 35 years is the median latency period for mesothelioma in the United States, you wouldn't quarrel with that. A. No."); Tr. 1083:9-14, 7/25/13 PM (Weill) ("Q. You would agree that 35 years is just the beginning -- or maybe the mid point of the latency period for mesothelioma. A. Yeah, I think that's about the mid point, yes.").

[12] See Grady v. A.H. Robins Co. (In re A.H. Robins Co.), 839 F.2d 198, 203 (4th Cir. 1988) (holding that a tort "claim" related to the use of the Dalkon Shield intrauterine device arose prepetition "when the Dalkon Shield was inserted in the claimant prior to the time of filing of the petition," even though the claimant's injuries did not manifest until later); cf. JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010) ("We . . . hold that a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury . . . . Applied to [asbestos creditors], it means that their claims arose . . . [on] the date [they] alleged that [the debtor's] product exposed [them] to asbestos.").

[13] The parties' estimation experts predict the following number of claimants:

Dr. Bates (Garlock)	2,177 (present)	16,807 (future)
Dr. Peterson (ACC)	4,754 (present)	25,813 (future)
Dr. Rabinovitz (FCR)	4,379 (present)	21,389 (future)

Tr. 3882:22-3883:2, 3902:14-18, 8/8/13 PM (Peterson) (providing his estimate of claimants); Peterson Demonstrative PowerPoint, at 40 (ACC-824a) (same); Tr. 4169:20-4170:2, 8/9/13 (Rabinovitz) (providing her estimate of claimants); Rabinovitz Demonstrative PowerPoint, at 17, 46-47 (FCR-42) (providing her estimate and Dr. Bates' estimate of claimants).

A worker's occupation is indicative of the types of asbestos-containing products to which he or she would have been exposed. Thus, for example, insulators, who necessarily spent a significant amount of time installing and removing insulation, have exposure to asbestos from those products; pipefitters or machinists would have exposure to asbestos from gaskets and other asbestos-containing sealing products. However, given the prevalent use of asbestos in industrial settings in the twentieth century, workers were exposed to asbestos fibers from multiple products, to a greater or lesser degree.[14] And while it is understood that asbestos fibers cause various diseases, it is not possible, as a scientific matter, to isolate which company's asbestos product was responsible.[15] That is because asbestos fibers do not bear identifying markers and 90% of the asbestos used in the United States across different products was of the same fiber type, namely chrysotile.[16] Further, many victims never knew the names of the asbestos products they were exposed to or, given the long latency period, had forgotten any names they might have known.[17] There is also often a limited period for discovery between diagnosis and death in mesothelioma cases.[18] All of this creates an inherent ambiguity that is specific to asbestos cases:

---

[14] Tr. 901:16-19, 7/25/13 AM (Henshaw) (Q. "And in many of those depositions, the claimants or other people testified about people doing gasket work where they were also being exposed to thermal insulation, correct? A. That's correct."); see also Garlock Information Brief, at 13-16 ("[W]orkers in environments where Garlock gaskets were present had substantial exposures to now-notorious [asbestos-containing] products.").

[15] Tr. 2154:18-2155:7, 7/31/13 (Welch) ("Q. Now from what you said before about the cumulative exposure, does that mean that you or any other scientist can't take an individual patient and say, okay, we're going to do an autopsy now. We can identify the fiber and we know it was made by Johns-Manville? A. Well, yeah, there's many reasons you can't do that . . . .").

[16] Id. (stating that "fibers . . . don't come with a product label"); Tr. 711:8-15, 7/24/13 PM (Boelter) (excerpting from his article that chrysotile comprises "about 90 percent of all asbestos used").

[17] See, e.g., Tr. 3488:11-12, 8/7/13 AM (McClain) ("[M]ost of my clients don't remember many products names, don't know whether it was asbestos or not.").

[18] See, e.g., Tr. 3488:1-3489:11, 8/7/13 AM (McClain) (describing the timing of discovery and filing suit, given that mesothelioma victims "die very fast").

neither plaintiffs who worked in industrial settings nor asbestos defendants can show with absolute certainty that one company's product caused, or did not cause, a plaintiff's disease.

Garlock too disputes its liability for present and future asbestos mesothelioma claims. In fact, Garlock submits that in every instance another company is at fault.[19] But that does not take those claims away from the FCR's purview. That is because section 101(5)(A) of the Bankruptcy Code defines a "claim" in the broadest possible terms to include not only liquidated and fixed claims but also contingent, unmatured, and disputed claims. See 11 U.S.C. § 101(5). Likewise, the Court's Appointment Order does not limit the FCR's representation to "undisputable" future asbestos claims. It does not follow that claimants who cannot demonstrate requisite exposure to asbestos fibers from Garlock's products and proof of an asbestos-related illness should be compensated by any section 524(g) trust that results from this bankruptcy. They should not; but that prohibition is no different from Garlock's prepetition treatment of mesothelioma claims where it required the same proof.

B. Section 524(g) Plans

The two fundamental goals of any bankruptcy – maximizing the pool of assets to pay claims and ensuring that claims are treated fairly – apply equally to a section 524(g) reorganization plan, with the additional express recognition of the interests of future claimants in light of the extraordinary 524(g) injunction that channels future claims. Thus, among other requirements, as noted, a 524(g) injunction cannot be issued absent appointment of a legal representative to protect the rights of future claimants. Section 524(g) further requires a finding

[19] Tr. 2533:13-19, 8/1/13 (Turlik) ("Well if you asked me, I think there was – it was a product that didn't cause disease. So if you asked me, we shouldn't have paid anything."); see also Garlock Information Brief, at 35 ("If any workers who used Garlock gaskets and packing developed asbestos disease at a higher rate than the general population, it was not because they used Garlock gaskets and packing. Rather, it was because they experienced massive exposures to long-banned friable asbestos products such as insulation.").

that the channeling of Garlock's, Coltec's, and EnPro's asbestos liabilities to a trust is fair and equitable to future claimants in light of those companies' trust contributions and other benefits provided under the trust. 11 U.S.C. § 524(g)(4)(B)(ii). In addition, the trust must be funded and structured in such a way as to provide reasonable assurance that it will value and pay present and future asbestos claims in substantially the same manner. Id. § 524(g)(2)(B)(ii)(V). Appropriate exposure standards, medical criteria, audits or other protections incorporated into the trust procedures ensure that valid claims are paid and future claimants receive the same recovery as present claimants.[20] Last, asbestos claimants must vote, by at least 75% of those voting, in favor of the section 524(g) reorganization plan and its trust. Id. § 524(g)(2)(B)(ii)(IV)(bb).

Further to the Court's Appointment Order and the requirements of section 524(g), the FCR's role in this case is to protect the rights of future claimants as a fully independent fiduciary, ensuring that they are treated fairly in any trust and will receive the same recovery and treatment as present claimants. Part of that role is to advise the Court of his findings so that the Court, in turn, may rely upon them in determining whether a 524(g) plan satisfies the statutory requirements. A plan that does not do so is necessarily unconfirmable. 11 U.S.C. § 1129(a)(1); see also In re Combustion Eng'g, Inc., 391 F.3d 190, 234 & n.46 (3d Cir. 2005) (explaining that "[t]he injunctive relief available under § 524(g) may only be exercised 'in connection with' an 'order confirming a plan of reorganization under Chapter 11'" and that "a debtor must satisfy the prerequisites set forth in § 524(g) in addition to the standard plan confirmation requirements") (quoting 11 U.S.C. § 524(g)(1)(A)).

[20] S. Todd Brown, How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts, 61 Buff. L. Rev. 537, 560-73 (2013) (discussing the exposure, medical, and quality control provisions in trust distribution procedures).

III. SCOPE OF THE ESTIMATION ORDER

The Court's Estimation Order provides that the Court will make "a reliable and reasonable estimate of the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims."[21] Specifically, the Court will "estimate the total amount of allowed mesothelioma claims in order to determine plan feasibility" and "for other purposes as well."[22]

The Court clarified that, while it would estimate the total amount of allowed mesothelioma claims, it did not "anticipate considering or determining any individual claims or any group of claims (other than the entire group [i.e., all the mesothelioma claims])."[23] This is consistent with the restrictions set forth in the Judicial Code that a bankruptcy court may not estimate or try individual personal injury tort or wrongful death claims. See 28 U.S.C. §157(b)(2)(B) and (5).

The Estimation Order focuses on mesothelioma claims because all the parties agree that they represent the largest percentage, in dollar values, of the asbestos claims against Garlock. Further, it is established that asbestos fibers are a cause of mesothelioma and the disease is, at this time, always fatal, thereby eliminating contentious issues such as confounding causations (e.g., smoking). In the five years before Garlock's bankruptcy petition, 77% of its asbestos indemnity payments ($363 million) were made to mesothelioma claimants.[24]

---

[21] Estimation Order, ¶ 10.

[22] Id. at 2, ¶ 10 (emphasis added).

[23] Id. at ¶ 11.

[24] See Garrison Database (ACC-892) (the referenced amounts were derived from the Garrison Database).

While the Estimation Order noted that the Court would not address Garlock's solvency during the estimation proceeding, the Court recognized that Garlock's "estimated mesothelioma liability may become the subtrahend of such a calculation at some point," i.e., for determining whether Garlock's assets exceed its liabilities and related legal issues, and whether a proposed plan of reorganization is fair and equitable to equity and satisfies the best interests test and other requirements of section 1129.[25] So that the estimate could be used in this calculation, the Court cautioned that it would "estimate the total amount of allowed mesothelioma claims."[26] See 1 Collier on Bankruptcy ¶ 3.06[1] (16th ed.) (endorsing the use of an "estimation in bulk" of personal injury tort and wrongful death claims "in order to determine whether the feasibility and the other confirmation standards have been satisfied"); see also 4 Collier on Bankruptcy ¶ 502.04[3] (16th ed.) (stating that an estimation pursuant to section 502(c) "generally should result in an allowed claim for all purposes in the bankruptcy case").

At the Estimation Hearing, the Court heard many days of expert testimony concerning whether a jury could reasonably find that the asbestos in Garlock's products could cause mesothelioma. In effect, the Court (and the FCR) sat through a mini asbestos trial, with the ACC and Garlock presenting the plaintiff's and defendant's cases, albeit without a mesothelioma victim present and without consideration of the unique facts and circumstances of an individual case. The Court, however, clarified in advance of the Estimation Hearing that it did not intend to make a definitive ruling on the parties' science cases, stating that:

> [O]ne of the beauties of estimation is that you don't have to decide specifically individual cases or the scientific evidence. For example, you don't have to decide or make a determination that chrysotile asbestos is not a cause of mesothelioma. You can accept the expert opinions that there are in the scientific world and deal

[25] Estimation Order, ¶ 12.

[26] Id. at 2 (emphasis added).

> with all of that in the estimate because it is, at the end of the day, an estimate and not a judgment on any individual case.[27]

Garlock has acknowledged that the Court would not decide the merits of any individual cases or decide any scientific issues.[28]

No party appealed the Estimation Order.

IV. NARROWING THE SCOPE OF THE ESTIMATION

Before addressing the FCR's estimate, the FCR first proposes deferring consideration of defense costs and liquidated and disputed settlements to narrow the scope of the Court's work.

Defense Costs. To be sure, the amount of money required to satisfy Garlock's mesothelioma claims under any plausible scenario must include significant defense or administrative costs. Garlock spent roughly $140 million in defense costs in the five year period before its bankruptcy and nearly all of that was on mesothelioma claims.[29] Further, Garlock's

---

[27] Hearing Transcript, dated Jan. 26, 2012 (Dkt. No. 1865), at 170:12-19.

[28] Tr. 18:25-19:1, 7/22/13 AM (Garlock Opening) ("We're not asking the court to decide the merits of any individual claim, or decide any scientific issues here.").

[29] FCR Demonstrative (Bates) – Defense Costs (FCR-36). Garlock's total annual asbestos defense costs doubled in the period from 1999 to 2009, from $14 million to $28 million. (Id.)

In the past, Garlock has attributed this increase to the additional amounts it alleges it had to spend demonstrating that plaintiffs with mesothelioma claims were exposed to not only Garlock's asbestos-containing products but other companies' products. (Debtors' Trial Brief and Summary of Evidence to Be Presented at Trial, dated July 8, 2013 (Dkt. No. 3002) ("Debtors' Trial Brief"), at 4 ("Rather, Garlock's average settlement in mesothelioma cases increased from approximately $5,000 in in [sic] the five-year period from 1995 to 1999 to more than $70,000 by 2010 because its *cost of defense* increased enormously after its co-defendants entered bankruptcy. . . . If Garlock was going to demonstrate it had no liability at trial, it had to develop the evidence itself, at great expense, which greatly increased Garlock's defense costs and allowed plaintiffs to extract more in settlement.") (emphasis in original).)

But during that time frame Garlock only tried 0.2% of its mesothelioma cases and it did not settle any claim requiring, as an element of its settlement, evidence of exposure to other products. (Bates White Database (GST-8002) (the referenced amount was derived from the Bates White database); Tr. 3199:1-11, 8/6/13 (Magee) ("Q. Now when Garlock made such a settlement . . . it did not require the plaintiff, did it, to make any representations in the settlement documents with respect to what other exposures to other people's products the plaintiff might have? A. No. That was not the purpose of that submission. Q. That was never a condition of settlement? A. That was not a condition of settlement."); Designated Deposition Testimony of Tim O'Reilly, dated Feb. 22, 2013, at 115:12-116:24 ("Q. Did you ever condition

own estimation model specifically contemplates that every mesothelioma claim will go to trial. While Garlock does not calculate the defense costs attendant to such an undertaking, the cost would run into billions of dollars.[30] And if Garlock's proposed claim resolution procedures were implemented, they too would engender much claim litigation.[31] Thus, Dr. Rabinovitz, the FCR's estimation expert, included a projection of Garlock's future defense costs in her estimate, calculated by reference to Garlock's past defense costs.[32]

But Garlock's new estimation model is not, as Garlock's expert acknowledged, based in reality; rather, it is an idealized model: Garlock could never litigate every one of the 20,000 plus

---

settlement on the submission of information about third-party exposures? A. Not to -- MR. CASSADA: Objection to the vagueness of the question. A. Not to my recollection.").) Therefore, the doubling of costs is attributed to the simple fact that the number of mesothelioma claims against Garlock doubled during the same period, from 899 to 1833. (FCR Demonstrative (Bates) – Defense Costs (FCR-36).)

Later, Garlock suggested at trial that no one could know for sure what caused the increase in defense costs because Garlock did not maintain records distinguishing between defense costs for mesothelioma claims and those for other claims. (Tr. 3031:17-3032:18, 8/5/13 AM (Bates) ("Q. Dr. Bates, you're saying that you don't have any breakdown of incurred costs? Is that what I heard? A. I don't have the breakdown by disease.").) But Garlock's own witness, Mr. Glaspy, confirmed that in the 2000s Garlock spent nearly all its defense cost dollars on mesothelioma cases. (Tr. 4670:6-9, 8/22/13 (Glaspy) ("Q. Now, you testified before, I think, that in terms of your defense costs that you were aware of in the post-2000 time frame, nearly all of that was taken up by meso cases. A. Yes.").)

[30] See generally Trial Brief of the Official Committee of Asbestos Personal Injury Claimants for Estimation of Pending and Future Mesothelioma Claims, dated July 8, 2013 (Dkt. No. 3004), at 32 (noting that Dr. Bates' scenario "implies costs of $9.5 billion").

[31] See, e.g., Objection of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Proposed Disclosure Statement, dated Jan. 9, 2012 (Dkt. No. 1808), at 23-24 (representative of current asbestos claimants explaining that, under the Debtors' proposed Claims Resolution Procedures ("CRP"), all claimants except for those suffering from pleural mesothelioma "would be deemed to have elected the Litigation Option" and even among the claimants suffering from pleural mesothelioma "it is unlikely that many would choose the Settlement Option, as the criteria imposed by the [CRP] would be so onerous that most claimants would have no incentive to choose that mode of resolution over taking their chances under the 'Litigation Option'").

[32] Tr. 4194:18-4195:24, 8/9/13 (Rabinovitz). Specifically, Dr. Rabinovitz estimated Garlock's future defense costs to total $303 million to $322 million. (Rabinovitz Demonstrative PowerPoint, at 32 (FCR-42).)

mesothelioma cases against it in the real world.[33] Therefore, Garlock would continue its practice of only trying a very small percentage of the cases, while settling and dismissing the remainder. Also, the Court has already advised the parties that Garlock's plan, with its attendant non-consensual trust distribution procedures, is not confirmable.[34] If Garlock is to successfully reorganize, the more likely scenario is for a plan of reorganization based on consensual trust distribution procedures, which plan, as Garlock has argued, should realize savings in defense costs, although the amount of those savings cannot be known until the parameters of the procedures are finalized. Recognizing the potential for such savings but also that the amount is currently unknown, the FCR proposes that the Court defer consideration of the magnitude of the defense costs issue until presentation to this Court of a confirmable plan with final trust distribution procedures. At that time, the Court and the parties will be able to intelligently assess the amount of money required to administer the trust properly.

Liquidated & Disputed Settlement Amounts. As with defense costs/administrative costs, all prepetition settlement amounts must ultimately be considered in any estimate.[35] But the FCR was unable to obtain definitive information on the number and amount of such settlements in

[33] Tr. 2993:21-2994:1, 8/5/13 AM (Bates) ("Q. [Dr. Heckman] characterized what you did as an idealized approach, remember that? A. I understand what he meant by that. . . .").

[34] Hearing Transcript, dated Jan. 26, 2012 (Dkt. No. 1865), at 10:16-19 (stating that Garlock's plan is "not something that could be confirmed" and looked "like a sham").

[35] Tr. 4189:5-4190:22, 8/9/13 (Rabinovitz) ("[F]rom the viewpoint of the futures representative, it is very important to get these numbers right. Because what tends to happen is that if a trust is formed, the people who come in first are, of course, people with contracts, the settled but not paid claims. And then there are disputed claims, and the numbers of these can get very, very large."); Tr. 4200:19-4201:2, 8/9/13 (Rabinovitz) ("[T]he futures representative has to be concerned of money that goes out -- I'm sorry, with money that goes out at a hundred percent the day that a trust opens its doors."); Rabinovitz Demonstrative PowerPoint, at 29 (FCR-42).

advance of the Estimation Hearing.[36] Given that the plaintiff firms and Garlock cannot agree, the FCR proposes deferring on that issue until the amount can either be resolved by consent between the parties or, barring that, by Court order, such as a settlement bar date order. In any confirmable plan, Garlock will have to make provision for the settlements once they are liquidated, but the fixing of the amount should not delay this estimation. The FCR stresses that while he is willing to defer on that issue now, it will have to be resolved before plan confirmation and the finalization of requisite trust funds.

Exclusion of defense costs and liquidated and disputed settlements allows the Court to focus on the aggregate minimum amount of money that Garlock will require to satisfy solely the indemnity portion of present and future mesothelioma claims.

V. ESTIMATE OF THE AGGREGATE MINIMUM AMOUNT OF GARLOCK'S ALLOWED PRESENT AND FUTURE MESOTHELIOMA CLAIMS

The FCR submits that a reliable and reasonable aggregate estimate, on a net present value basis, for allowed present and future mesothelioma claims against Garlock, exclusive of defense and administrative costs and liquidated and disputed settlements, is at least $949 million.[37] The components of that amount, as estimated by Dr. Rabinovitz, are $171 million for present

[36] The FCR requested information from Garlock concerning such settlements on numerous occasions. The last response that the FCR received from Garlock was only days before Dr. Rabinovitz's initial report was due (Tr. 2690:5-13, 8/2/13 PM (Gallardo-Garcia)) and, even then, Garlock and the plaintiff firms were still in disagreement.

[37] Rabinovitz Demonstrative PowerPoint, at 29, 32, 35 (FCR-42). This post-trial brief focuses on Dr. Rabinovitz's base case, which is her "preferred case." (Tr. 4169:23-4170:4, 8/9/13 (Rabinovitz).) Dr. Rabinovitz's adjusted indemnity case, which adjusts for the argument that claims decline in value as people age and assumes that claims over six years old will not be paid, estimates Garlock's liability at $893 million, excluding defense and administrative costs and liquidated and disputed settlements. (Tr. 4170:17-4172:7, 8/9/13 (Rabinovitz); Rabinovitz Demonstrative PowerPoint, at 29, 32, 36 (FCR-42).)

mesothelioma claims and $778 million for future mesothelioma claims.[38] That amount does not include non-mesothelioma claims, which could be significant.[39]

The method used by Dr. Rabinovitz to calculate her mesothelioma estimate has been adopted by numerous courts, including in a recent case where, like Garlock, the debtor contested its asbestos liability. See In re Specialty Products Holding Corp., No. 10-11780, 2013 WL 2177694, at *1 (Bank. D. Del. May 20, 2013) ("In estimation proceedings the Court is to determine [the present and future mesothelioma claims caused by exposure to the Debtors' asbestos] based on the Debtors' tort system claiming history."). See also In re Armstrong World Indus., Inc., 348 B.R. 111 (D. Del. 2006); Owens Corning v. Credit Suisse First Boston, 322 B.R. 719 (D. Del. 2005); Official Comm. of Asbestos Claimants v. Asbestos Property Damage Comm. (In re Federal-Mogul Global, Inc.), 330 B.R. 133 (D. Del. 2005); In re Eagle-Picher Indus., Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995). It is also tested, both in Dr. Rabinovitz's SEC reporting work and in bankruptcy cases.[40]

Dr. Rabinovitz follows an established methodology in deriving her estimate, which was discussed in detail at the Estimation Hearing. The relevant steps of that methodology with the deferral of defense costs are: (i) estimating the size of the population exposed to asbestos; (ii) forecasting the proportion of persons exposed to asbestos who develop mesothelioma; (iii)

---

[38] Rabinovitz Demonstrative PowerPoint, at 29, 32, 35 (FCR-42).

[39] Tr. 4173:3-7, 8/9/13 (Rabinovitz) ("Q. These are only Mesothelioma claims; right? A. Yes. Q. The number, the total numbers, would obviously increase if we added in lung cancers and others; correct? A. Yes."). The parties in In re Specialty Products Holding Corp., for example, agreed that the debtors' liability for all asbestos claims could be estimated by multiplying the present value of mesothelioma claims by 1.06 (i.e., increasing the estimate by six percent). No. 10-11780, 2013 WL 2177694, at *1 n.2 (Bankr. D. Del. May 20, 2013).

[40] Tr. 4223:8-11, 8/9/13 (Rabinovitz) ("We get tested on our forecast methodology every quarter and particularly every year by companies who are reporting these estimates as their contingent liability. We get tested in bankruptcy proceedings."); see also Tr. 4214:18-22, 8/9/13 (Rabinovitz).

calculating the percentage of the population who will file mesothelioma claims against Garlock; (iv) estimating the value of those mesothelioma claims; and (v) applying inflation and discount rates to determine the net present value of Garlock's mesothelioma claims.[41] These steps are discussed below in the context of explaining why Dr. Rabinovitz's estimate is reliable and reasonable – the twin requirements of the Court's Estimation Order.

A. Dr. Rabinovitz's Estimate is Reliable.

1. The estimate is predicated on a respected model.

Dr. Rabinovitz's estimate is predicated on the Nicholson-KPMG model, which forecasts the number of individuals exposed to asbestos who are likely to contract mesothelioma, steps (i) and (ii) above.[42] The Nicholson model has proved to be largely accurate over the last 30 years, has been peer reviewed, and is respected by all parties.[43]

[41] See Tr. 4173:15-4198:1 (Rabinovitz) (discussing her estimation methodology).

[42] Tr. 4173:25-4175:21, 8/9/13 (Rabinovitz). As Dr. Rabinovitz explained, the "Nicholson" model was created in 1978, prior to the issuance of the Bureau of Labor Statistics' data associated with the 1980 census. (Id.) The "Nicholson-KPMG" model was created in 1991 and updates the Nicholson model to include the 1980 census data. (Id.)

[43] In re Specialty Prods. Holding Corp., 2013 WL 2177694, at *1 n.7 ("The Nicholson model is that most often used to estimate mesothelioma claims. Nicholson was an epidemiologist and his model is the only one that has been peer reviewed. In addition, his approach has been confirmed by 30 years of data . . . ."); Tr. 4176:16-18, 8/9/13 (Rabinovitz) ("Q. Does . . . your field recognize it as a reliable model to use in asbestos claims estimates? A. Yes."); Tr. 4177:18-25, 8/9/13 (Rabinovitz) ("Q. Now Dr. Rabinovitz, I had asked you about whether Dr. Bates uses as the foundation of his work that model and you had answered, I think, believing that I had said Dr. Peterson. But would the answer be any different? A. Well it's the foundation of all of what we use. Dr. Bates' model has actually moved off the Nicholson format. It's somewhat different. But it starts with Nicholson, as does Dr. Peterson's model."); Tr. 4224:1-4, 8/9/13 (Rabinovitz) (agreeing the Nicholson-KPMG model is a "highly reliable and highly respected model").

2. The estimate is based on Garlock's claims history.

Dr. Rabinovitz's mesothelioma estimate is directly derived from Garlock's own database of approximately 21,000 claims, as updated by Garlock in May 2011.[44] That database, which was characterized by Garlock's expert as "robust" and having a "significant amount of information," provides the data from which to determine Garlock's propensity to sue percentages and mesothelioma claim values, steps (iii) and (iv) above.[45] The jurisdictional scope and number of claims also reflects Garlock's history of manufacturing and selling asbestos-containing products throughout the United States in multiple industrial applications until 2001.[46]

3. The estimate utilizes respected sources for inflation and discount rates.

Dr. Rabinovitz's estimate adjusts the future mesothelioma claims for inflation and then discounts the claims to their net present value as of the date of Garlock's bankruptcy filing, step (v). To do so, Dr. Rabinovitz uses inflation rates of between 1.0% and 2.3% (depending on the year) derived from the Congressional Budget Office's publications, as provided to her by Joseph Radecki, the FCR's financial advisor and expert.[47] She then applies a risk free discount rate of 2.81%, also provided by Mr. Radecki, which is derived from yields in the market for U.S.

---

[44] Garrison Database (ACC-892); see also Tr. 4169:10-11, 8/9/13 (Rabinovitz) ("We relied on the database which, for us in any case, is usually the Gold Standard."); Tr. 4202:17-19, 8/9/13 (Rabinovitz) ("Q. You're just relying, as always, on the debtor's data. Correct? A. Yes."); Tr. 4216:7-10, 8/9/13 (Rabinovitz) ("We're looking at thousands and thousands of claims, most of which were settled, along with this handful of verdicts.").

[45] Tr. 2674:18-25, 8/2/13 (Gallardo-Garcia) ("I think it's a good database. For the information it contains, I think it is robust."); Tr. 2679:7-15, 8/2/13 (Gallardo-Garcia) (confirming that the Garrison database is "a good record of Garlock's claims").

[46] Garlock's Discovery Responses (Kilburn), at GST-EST-0108978 (ACC-68) ("[Garlock's] last asbestos-containing gasket sale is believed to have been in early 2001."); see also Garlock Information Brief, at 20 ("By 2001, Garlock had found substitutes for most industrial applications of asbestos gaskets and packing.").

[47] Tr. 4195:25-4196:9, 8/9/13 (Rabinovitz).

Treasuries for the specific period when the majority of claims will be made.[48] Each estimation expert agrees that the use of a risk free rate is reasonable.[49]

B. Dr. Rabinovitz's Estimate is Reasonable.

In addition to being based on reliable sources/data – i.e., a tested model, a robust database, and respected government/market sources for inflation and discount rates – Dr. Rabinovitz's aggregate estimate is reasonable.

1. The estimate is derived from Garlock's prepetition merits-based analysis of claims.

Dr. Rabinovitz's estimate is derived from what Garlock paid, on average, to resolve approximately 8,600 mesothelioma claims in the five years before its bankruptcy, when Garlock's own in-house and outside legal counsel, with decades of experience in defending asbestos personal injury cases, determined the value of those claims, always seeking to pay the smallest amount possible.[50]

When Garlock approved claims for payment, Garlock's legal team engaged in a detailed, merits-based claims analysis.[51] Garlock always required evidence that the claimant worked with

---

[48] Tr. 4195:25-4196:9, 4197:7-24, 8/9/13 (Rabinovitz).

[49] See Tr. 3902:11-13, 8/8/13 PM (Peterson) ("We use a discount rate of 3.251 percent, which is a risk-free rate of return . . . ."); Tr. 4197:7-4198:1, 8/9/13 (Rabinovitz) (relying on Mr. Radecki's calculation of the risk free discount rate); Tr. 4835:8-9, 8/22/13 (Bates) ("Q. You used the risk free rate, didn't you? A. Yes, I did."). Despite Dr. Bates' use of the risk free rate, Garlock's financial expert, Dr. Karl Snow, proposed that Garlock's future mesothelioma liabilities should be discounted using its weighted average cost of capital ("WACC"). (Dr. Karl Snow Deposition Testimony, dated June 12, 2013, at 45:5-15.) As Mr. Radecki testified, the WACC rate is used to determine the cost that a company pays to raise capital but is "not a good tool for determining the absolute claim value of a claim." (Tr. 1364:23-1367:10, 7/26/13 PM (Radecki).) Dr. Snow himself acknowledged that the WACC rate produces divergent results even when all factors, except for the profitability of a company, are held constant. (Dr. Karl Snow Deposition Testimony, dated June 12, 2013, at 100:4-103:8.)

[50] Rabinovitz Demonstrative PowerPoint, at 27 (FCR-42).

[51] Tr. 2529:13-2533:2, 8/1/13 (Turlik) ("Q. Would you agree with me that when you weighed all those factors, you put them together, you put them in the hopper and made a decision whether to settle or not,

Garlock's asbestos-containing products and a medical report substantiating the victim's mesothelioma.[52] In analyzing whether and how much to pay on a claim, Garlock considered, among other factors: the plaintiff's mortality, age, occupation, and number of dependents; the jurisdiction where the action was brought; the presence of other possible causes of the plaintiff's mesothelioma; alternative sources of payment available to the plaintiff from co-defendants and section 524(g) trusts; the availability of legal defenses; the law firm bringing the claim; and whether the action was an individual one or part of a group.[53] That merits-based analysis was evidenced by EnPro's securities filings, the deposition and trial testimony of Garlock's lawyers, and contemporaneous documents reflecting Garlock's assessment of the trial risk of the cases it was settling – the MEA forms.[54]

---

you were in effect evaluating the strengths and weaknesses of each side's case? A. When I gave the recommendations that I gave. Q. The answer would be yes? A. Yes, based on the knowledge and the evidence that we saw coming into court."); Tr. 3119:19-3124:12, 8/5/13 PM (Magee) (describing the various factors considered when settling cases); Tr. 4662:23-4664:3, 8/22/13 (Glaspy) ("Q. Would you agree with me, sir, that when you were settling cases, you were evaluating the strengths and weaknesses of individual cases? A. I was, as well as the cost to defend those cases.").

[52] EnPro, Annual Report (Form 10-K) for fiscal year ended December 31, 2006 ("EnPro 2006 10-K"), at 34 (FCR-39) ("Before any payment on a settled claim is made, the claimant is required to submit a medical report acceptable to Garlock substantiating the asbestos-related illness and meeting specific criteria of disability. In addition, sworn testimony or other evidence that the claimant worked with or around Garlock asbestos-containing products is required."); Tr. 3120:24-3122:3, 8/5/13 PM (Magee) ("If a case was presented as a Mesothelioma case, I believe I testified that we would have to have a diagnosis -- a confirmed diagnosis of Mesothelioma."); Tr. 3123:21-3124:5, 8/5/13 PM (Magee) (confirming that Garlock also needed "sworn testimony" that the "claimant worked with or around Garlock products"); Tr. 3132:23-3133:2, 8/5/13 PM (Magee) (same).

[53] EnPro 2006 10-K, at 34 (FCR-39); Tr. 2529:13-2533:2, 8/1/13 (Turlik); Tr. 3119:19-3124:12, 8/5/13 PM (Magee); Tr. 4662:23-4664:3, 8/22/13 (Glaspy).

[54] See, e.g., EnPro 2006 10-K, at 34 (FCR-39) (listing settlement considerations); Tr. 4662:23-4664:3, 8/22/13 (Glaspy) ("Q. Did you consider trial risks when you settled [mesothelioma] cases? A. Always."); Tr. 2529:13-2533:2, 8/1/13 (Turlik) (describing settlement considerations); Tr. 3119:19-3124:12, 8/5/13 PM (Magee) (describing settlement considerations); Garrison Litigation Major Expense Project Approval, dated Sept. 2005 (ACC-767) ("[I]f we do not agree to settle these cases, which is clearly the prudent and advisable thing to do based upon the merits of these cases . . . Garlock would most probably be faced with a verdict exceeding a billion dollars, including a punitive damages finding."); Garrison Litigation Major

2. The estimate is based on a time period that fairly reflects the future.

Dr. Rabinovitz based her estimate on the five-year period before Garlock's bankruptcy, 2005 to 2010. That period fairly reflects the future in that Garlock's insulator co-defendants were no longer paying claims in the tort system and bankruptcy trusts were paying claimants on a regular basis – both trends that are here to stay.[55] As Garlock has shown, nearly all the major insulator defendants had filed by 2001.[56] That reality is now fixed. Those companies are not returning to the tort system. As to the trusts, multiple new trusts came on line in that five year period and distributed over $14 billion in claim payments through 2011.[57] Thus, any impact from the payment of trust monies on solvent defendant indemnity payments would have been realized during that period.[58] It would be erroneous to estimate Garlock's indemnity payments by reference to the 1990s when Garlock's litigation environment was very different from what it is today and can reasonably be expected to be in the future.[59]

Expense Project Approval, dated Mar. 2004 (ACC-766) ("If we won 60 percent of these cases, unlikely at best in Oakland, the verdicts we received would be extremely large and have a shattering effect.").

[55] Tr. 4185:2-15, 8/9/13 (Rabinovitz) ("Well I think the recent history is the best because it already takes into account all the series of events which have occurred up to that point. All of the people who are negotiating these cases are familiar with those details. And I'm sure in their negotiations, none of the very fine lawyers on either side has missed the opportunity to point out some recent event or activity or scientific research or something else which has occurred."); Tr. 4210:4-8, 8/9/13 (Rabinovitz) ("As I have already said, these trusts have been playing [sic] claims for a while. Presumably, plaintiffs and defendants are taking them into account. And Garlock's historical experience, at least for the most recent five years, reflects what's being paid."); see also Tr. 3865:3-3868:1, 8/8/13 PM (Peterson).

[56] Tr. 1158:15-1159:20, 7/26/13 AM (Brickman); Brickman Demonstrative PowerPoint, at 11 (GST-8007).

[57] Marc C. Scarcella & Peter R. Kelso (Bates White Economic Consulting), Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance, Mealey's Asbestos Bankruptcy Report, Vol. 11 (June 2012), at 2.

[58] Tr. 4210:4-8, 8/9/13 (Rabinovitz); Towers Watson, "2012 Casualty Loss Reserve Seminar – Concurrent Session LOB-1: Current Issues with Asbestos," dated Sept. 7, 2012, at 10-11 (GST-6595).

[59] Tr. 4302:11-4305:7, 8/12/13 (Rabinovitz) ("[W]e also believe that if we're trying to predict the future, the likelihood that the system will revert to the conditions in the 1990s may be small.").

3. The estimate is supported by Garlock's prepetition estimates of its asbestos liabilities.

Garlock's own prepetition estimates of its total asbestos liabilities, for both mesothelioma and other asbestos claims, support the reasonableness of Dr. Rabinovitz's mesothelioma estimate. Prepetition, Coltec, Garlock's immediate parent, retained the consulting firm Tillinghast-Towers Perrin ("Tillinghast") to estimate Garlock's asbestos liabilities. In 2000, Tillinghast estimated that the nominal amount of those liabilities, through 2049, ranged from approximately $1.8 billion to $2.8 billion, inclusive of defense costs.[60] Four years later in 2004 and after what Garlock has characterized as the last "bankruptcy wave," EnPro conducted its own internal analysis and concluded that the asbestos liabilities could exceed $1.1 billion between 2004 and 2009 alone.[61] As recently as December 2009, Bates White, Garlock's expert, estimated that Garlock's asbestos liabilities would range from $480 million to $602 million nominal in the next ten years.[62] EnPro ultimately relied on Bates White's ten-year estimate for reporting purposes, but it acknowledged that "[s]cenarios continue to exist that could result in total future asbestos-related expenditures for Garlock in excess of $1 billion."[63] Indeed, EnPro's own internal forecast for 2009, prepared by its then General Counsel, Mr. Magee, projected that Garlock's total payments to resolve asbestos claims through 2053 could total $1.27 billion,

[60] Tillinghast-Towers Perrin, "Analysis of Contingent Asbestos Liabilities," dated Dec. 13, 2000 ("Tillinghast Estimate"), at 5 (FCR-49) ("Based on our review of Garlock's experience, the indicated gross contingent liabilities as of October 24, 2000, including outside defense costs for third party asbestos-related claims, ranges from $1.82 billion to $2.77 billion, on an undiscounted basis gross of insurance coverage.").

[61] EnPro, "Asbestos Claims Internal Estimate," dated Oct. 13, 2004, at Bates No. 0108373 (FCR-37).

[62] EnPro, Annual Report (Form 10-K) for fiscal year ended December 31, 2009 ("EnPro 2009 10-K"), at 34 (FCR-50) ("The estimated range of potential liabilities provided by Bates White at December 31, 2009 was $480 million to $602 million."); see also Tr. 2894:16-2895:6, 8/5/13 AM (Bates).

[63] Id. at 35.

inclusive of defense costs.[64] In preparing this forecast, Mr. Magee factored in the impact of future trust payments to claimants.[65]

Critically, in each of these internal prepetition estimates, Tillinghast, Bates White, and EnPro estimated the amount of money Garlock would need to resolve present and future asbestos claims based upon what it had paid to resolve asbestos claims in the past.[66]

4. The estimate compares favorably with the estimates of the ACC's and Garlock's experts.

Dr. Rabinovitz's mesothelioma estimate, exclusive of defense costs and liquidated and disputed settlements, also compares favorably with the estimates of the ACC's expert, Dr. Mark Peterson, and Garlock's expert, Dr. Bates. Dr. Peterson followed the same basic methodology as Dr. Rabinovitz, relying on the Nicholson model for forecasting mesothelioma mortalities, without the subsequent adjustments by KPMG, and using Garlock's actual claim history (2006-

[64] "EnPro Asbestos History, Forecast, Budget and Projection" (2009), at Bates No. 122616 (FCR-38).

[65] Tr. 3146:18-3148:2, 8/5/13 PM (Magee) ("Q. . . . So going forward from 2006 you definitely considered the 524(g) trust in your estimate. A. Absolutely. Really from the time that we retained Dr. Bates. So I would say it probably was the first part of the estimate for the year end 2004.").

[66] Tr. 2667:15-2668:5, 8/2/13 (Gallardo-Garcia) (confirming that, in preparing estimates for EnPro, Bates White looked at Garlock's "prior claims history," "what the company paid in the real world to resolve those claims," and "the historical data that was available"); Tillinghast Estimate, at 5 (FCR-49) (stating that the estimate is based on a "review of Garlock's experience"); see also Coltec Indus. Inc. v. United States, 62 Fed. Cl. 716, 723-25 (Fed. Cl. 2004) (explaining that Tillinghast "prepared various estimates of future Anchor and Garlock asbestos liabilities" after receiving "several years of asbestos litigation data, including detailed information concerning claims filings, settlements, dismissed cases, and outside legal expenses for Anchor and Garlock").

2010).[67] He opined that the net present value of Garlock's current and future mesothelioma liabilities, exclusive of defense costs, is $1.265 billion.[68]

Dr. Bates did provide the Court with a low estimate based on the assumptions that every claim goes to verdict and Garlock expends no costs defending those claims. Coltec's expert, Dr. Heckman, characterized Dr. Bates' assumptions as "idealized."[69] However, Garlock also elicited testimony from Dr. Bates at the Estimation Hearing where he estimated Garlock's mesothelioma liabilities through 2059 using the same methodology used by Dr. Rabinovitz and Dr. Peterson, i.e., the methodology Dr. Bates used himself when estimating Garlock's asbestos liabilities in the years before its bankruptcy.[70] At the Estimation Hearing, using that established methodology,

---

[67] Tr. 3881:7-3882:21, 8/8/13 PM (Peterson) ("[T]he calculations that I do are basically the same thing that Dr. Rabinovitz does. There are differences in judgments throughout, but the basic calculations are the same."); Tr. 3884:7-3885:19, 8/8/13 PM (Peterson) ("[W]e looked at the experience of Garlock over the period of 2006 to 2010.").

[68] Tr. 3903:13-17, 8/8/13 PM (Peterson) ("[P]ending and future is $1,265,000,000."); Peterson Demonstrative PowerPoint, at 40 (ACC-824a). Dr. Peterson also provided a secondary estimate of $1.077 billion. (Tr. 3903:17-21, 8/8/13 PM (Peterson); Peterson Demonstrative PowerPoint, at 40 (ACC-824a).)

[69] Tr. 2993:21-2994:1, 8/5/13 AM (Bates) ("Q. [Dr. Heckman] characterized what you did as an idealized approach, remember that? A. I understand what he meant by that. . . ."). The FCR does not mean to imply that the Court should or needs to reject Dr. Bates' opinions outright, either under his novel, counter-factual methodology or when using the established methodology. Rather, the better approach is the one already adopted by the Court in its own Estimation Order, namely an estimation ruling that affords each expert's opinion its due weight based on its persuasiveness. See Estimation Order, ¶ 19 ("The court will hear such evidence as is appropriate relating to each approach and will make its decision based upon which is the more persuasive."); Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 725 (D. Del. 2005) (conducting a "comparative assessment" of experts' testimonies based on their persuasiveness). That is why, among other reasons, including judicial economy, the FCR declined to move to exclude Dr. Bates' testimony on Daubert grounds, despite its novel and untested nature.

[70] Tr. 2824:4-2827:15, 8/2/13 (Bates) (describing what his estimate would be using the "financial reporting model," which is what he labeled the methodology used by Dr. Rabinovitz and Dr. Peterson).

Dr. Bates estimated a liability range of $330 million to $670 million for mesothelioma claims on a net present value basis, with a midpoint of $500 million.[71]

Thus, when an apples to apples comparison is made, with all three well qualified experts using the same basic methodology and excluding defense costs, Dr. Rabinovitz's number is in the middle of the estimates prepared by Garlock and the ACC, and is presumptively reasonable:

	Estimate (NPV)
Dr. Peterson (ACC)	$1.265 billion
Dr. Rabinovitz (FCR)	$949 million
Dr. Bates (Garlock)	$330 - $670 million

It is noteworthy that when the inputs from Dr. Bates' counter-factual model are used that approximate Garlock's actual trial experience, they generate estimates higher than Dr. Rabinovitz's estimate, again buttressing the reasonableness of her number. Thus, Dr. Bates assumes, before any unilateral reductions, that there are 3,932 pending claims against Garlock and 28,402 future mesothelioma incidences.[72] If each were to go to trial and obtain an expected verdict of $4,293,872 (pending cases) and $2,501,902 (future cases), it would translate to pending and future verdicts of approximately $17 billion and $71 billion.[73] Dr. Bates reduces those numbers down to $25 million and $100 million by assuming that (i) over a third of the mesothelioma cases are not caused by occupational exposure and would never result in an

[71] Id.; see also Bates Demonstrative PowerPoint, at 61 (GST-8005). Dr. Bates' pre-petition estimates excluded defense costs. (EnPro 2009 10-K, at 35 (FCR-50) ("[T]he liability estimate does not include legal fees and expenses, which add considerably to the costs each year.").) Given that Dr. Bates applied the same methodology in reaching his new estimation, the FCR presumes that it likewise excludes defenses costs. (Tr. 2824:4-2827:15, 8/2/13 (Bates).)

[72] Tr. 2926:25-2927:11, 8/5/13 AM; Tr. 4840:1-3, 8/22/13 (Bates).

[73] See Rabinovitz Demonstrative PowerPoint, at 46-47 (FCR-42).

adverse verdict; (ii) Garlock shares any adverse verdict with 35 co-defendants; and (iii) Garlock loses at trial only 8% of the time.[74]

Dr. Bates' assumptions are subject to criticism in that Garlock's own defense counsel dismissed the usefulness of his client's non-occupational exposure defense[75]; on average, Garlock shared its verdicts with less than 3 co-defendants during its entire verdict history[76]; and Garlock lost 36% of the cases it took to verdict between 2001 and 2010.[77] If these real world inputs are used in Dr. Bates' counter-factual model – less than 3 co-defendants at verdict and a 36% loss rate – then the resulting liability number is $7.6 billion before any consideration of

---

[74] See Tr. 4838:8-4840:24, 8/22/13 (Bates); see also ACC Summary – Bates Method Pending [Calculation] (ACC-803); ACC Summary – Bates Method Future [Calculation] (ACC-808). Although a significant amount of trial time, and at least $13 million in Bates White's fees and expenses, was dedicated to generating Garlock's $125 million estimate, Garlock's own plan proposes a $270 million trust (Debtors' Trial Brief, at 5; Tr. 4828:25-4829:2, 8/22/13 (Bates) ("Q. And the amount that the debtors are proposing to fund the trust with is $270 million, correct? A. Correct.").) At the Estimation Trial, Garlock proposed a third option, estimates based on Garlock's claims, providing a range of $330-670 million. (Tr. 2824:4-2827:15, 8/2/13 (Bates); Bates Demonstrative PowerPoint, at 61 (GST-8005).) If Garlock believed that any of its low estimates would hold true when the claims against it are resolved under state law – i.e., those estimates which suggest Garlock has minimal asbestos liabilities and EnPro a correspondingly large equity stake – then the appropriate course of action would have been for Garlock to have dismissed its bankruptcy case long ago. In that Garlock has not done so, it appears that its $125 million estimate was intended to serve as a very low benchmark amount, in the hopes that the Court would fix an estimate between that estimate and creditor estimates as a "compromise amount." The debtors in the Bondex case, also relying on the Bates White firm for its low estimate, took the same "lowball" approach. The problem with that approach is that the Court would not have a reasoned basis for such a "compromise" number in that Garlock's novel theory and the established methodology are not subject to comparison. They are apples and oranges. Judge Fitzgerald declined the debtors' invitation and neither accepted the debtors' low end number nor fixed a compromise number in between the parties. See In re Specialty Prods. Holding Corp., No. 10-11780, 2013 WL 2177694 (Bankr. D. Del. May 20, 2013). Rather, Judge Fitzgerald estimated the amount the amount of debtors' claims between the lowest and highest ranges provided by the ACC's and the FCR's estimation experts. Id. at *9.

[75] Tr. 4219:4-5, 8/9/13 (Rabinovitz) (playing video excerpt of the Designated Deposition Testimony of David Glaspy, June 25, 2013, at 262:20-263:1 ("[M]y comment about idiopathic defense is it's idiotic and pathetic.")).

[76] See Debtors' Supplemental Responses to First Set of Interrogatories, dated Feb. 13, 2013 (ACC-519) (the referenced amount was derived from the Debtors' responses).

[77] Tr. 2572:4-16, 8/1/13 PM (Magee) (stating that Garlock lost 36 percent of the cases it took to verdict between 2001 and 2010); Magee Demonstrative PowerPoint, at 9 (GST-8016).

defense costs, even with Dr. Bates' reduction of exposures by one-third.[78] If the Court were to assume, like Garlock, that Garlock would lose 8% of the time but share with less than 3 co-defendants (reality), the number generated from the model is $1.7 billion.[79] The charts presented at trial show the total verdict values under these and all other scenarios in between, applying calculations derived from Dr. Bates' model. The vast majority of scenarios show aggregate verdict shares significantly in excess of Dr. Rabinovitz's estimate.

C. Dr. Rabinovitz's Estimate is Conservative.

In addition to being reliable and reasonable, Dr. Rabinovitz's estimate is also conservative. She assumes:

- In excess of 27,000 individuals will contract mesothelioma in the future from various occupational sources.[80] The actual number, however, may be higher. That is because Dr. Rabinovitz relies on the Nicholson-KPMG model, which was created decades ago and was based on data from the 1980 census. People now are living much longer and therefore are at greater risk of contracting the disease.[81]

[78] Rabinovitz Demonstrative – Pending & Future Garlock Mesothelioma Liabilities with Dr. Bates' Exposure Deduction, by Verdict Rate and Number of Liable Parties (FCR-43). Without Dr. Bates' exposure deduction, the resulting liability where there are fewer than 3 co-defendants at verdict and a 36% loss rate is nearly $13 billion before any consideration of defense costs. (Rabinovitz Demonstrative – Pending & Future Garlock Mesothelioma Liabilities Without Dr. Bates' Exposure Deduction, by Verdict Rate and Number of Liable Parties (FCR-44).)

[79] Rabinovitz Demonstrative – Pending & Future Garlock Mesothelioma Liabilities with Dr. Bates' Exposure Deduction, by Verdict Rate and Number of Liable Parties (FCR-43).

[80] Tr. 4187:3-13, 8/9/13 (Rabinovitz); Rabinovitz Demonstrative PowerPoint, at 22 (FCR-42). Dr. Bates estimates the future incidence of mesothelioma to be higher at 28,400. (Tr. 4840:1-3, 8/22/13 (Bates).)

[81] Tr. 4174:25-4175:18, 8/9/13 (Rabinovitz) (describing the creation of the Nicholson-KPMG model); Tr. 4176:24-4177:6, 8/9/13 (Rabinovitz) ("[M]ortality rates are declining, people are living longer, and that's not reflected in either the original Nicholson model or Nicholson KPMG.").

- 79% of the individuals who contract mesothelioma will bring claims against Garlock.[82] In recent years the propensity to sue number was even higher, a trend that may well occur in the future given that Garlock manufactured and sold asbestos-containing products through 2001, unlike asbestos insulation companies who stopped doing so in the 1970s.[83]
- 46% of the 26,000 pending and future claims brought against Garlock will not be paid.[84] In the decade prior to its bankruptcy, however, Garlock paid at significantly higher rates, sometimes up to 95%.[85]
- For present value calculations, aggregate inflation and discount rates of, respectively, 1.0–2.3% and 2.81%.[86] By comparison, Garlock uses a higher inflation rate of 2.5%.[87] Further, current market discount rates for the applicable claiming periods, as shown by yields on U.S. Treasuries, are much lower than 2.81%.[88]

---

[82] Tr. 4180:19-4181:14, 8/9/13 (Rabinovitz); Rabinovitz Demonstrative PowerPoint, at 24 (FCR-42).

[83] Tr. 4215:4-9, 8/9/13 (Rabinovitz) ("One of the things that has maybe not been emphasized enough is that their product remained in the market for longer than is true of many other companies. I thought it was 2001. . . . [T]hat also affects what I think will happen in the future."); Tr. 3478:10-14, 8/7/13 AM (McClain) ("In 1972, the insulation defendants stopped making asbestos insulation in pipe covering and block. It was outlawed by OSHA. So Garlock continued to make gaskets all the way in 2000 -- asbestos gaskets until 2000, 2001."); Rabinovitz Demonstrative PowerPoint, at 24 (FCR-42).

[84] Tr. 4186:6-15, 8/9/13 (Rabinovitz) (stating that "only 54 percent of the claims that were resolved in this [calibration] period were actually paid"); Rabinovitz Demonstrative PowerPoint, at 27 (FCR-42).

[85] Tr. 4182:10-4183:7, 8/9/13 (Rabinovitz) (discussing Garlock's "pay rate").

[86] Tr. 1346:11-20, 7/26/13 PM (Radecki) (stating, with respect to the base case, that the inflation rate utilized is "1.6 percent for 2010; 1 percent for 2011; 1.4 percent for 2012; 1.7 percent for 2013; 1.9 percent for 2014; and 2015 and thereafter, 2.3 percent annually"), Tr. 1348:18-1349:1, 7/26/13 PM (Radecki) (stating that his calculation of the discount rate is "2.81 percent"); Rabinovitz Demonstrative PowerPoint, at 34 (FCR-42) (listing inflation and discount rates for base and adjusted indemnity cases).

[87] Tr. 1357:9-13, 7/26/13 PM (Radecki) (explaining that Dr. Bates used a "2.5 percent" inflation rate); Tr. 4196:23-25, 8/9/13 (Rabinovitz) (confirming that her inflation rate is "lower" than Dr. Bates' rate).

[88] Tr. 1380:8-21, 7/26/13 PM (Radecki) (stating that the 10-year Treasury "is only at 2.6 right now" and that the three-month Treasury is "[l]ess than half percent").

- An average payment for future mesothelioma claims through 2054, on a net present value basis, of approximately $36,000.[89] Garlock, however, consistently paid amounts in excess of that in the years before its bankruptcy and may well be required to pay more to resolve cases against it in the future as other companies exit from the tort system and as a consequence of its decision to continue to manufacture and market asbestos-containing products until 2001. Moreover, it is possible that future claimants will, in the aggregate, value their mesothelioma claims above Dr. Rabinovitz's discounted average number of approximately $36,000, particularly as more companies exit from the tort system and claims of individuals who were exposed to Garlock's asbestos in the decades after the 1970s come to the fore. Just by way of example, recent jury awards for workers with mesothelioma claims against companies have been massive.[90] For current purposes, however, the FCR must rely on the merits-based price determined by Garlock, which equates to a total aggregate indemnity of $949 million, for a minimum baseline number.

* * *

Finally, in weighing not only the reliability, reasonableness, and conservative nature of Dr. Rabinovitz's estimate but also her credibility, Dr. Rabinovitz's expertise, independence, and lack of bias have not been questioned by any party and have been recognized by various federal courts, including the Court of Appeals for the Fourth Circuit. See In re A.H. Robins Co., 880

[89] Rabinovitz Demonstrative PowerPoint, at 35 (FCR-42).

[90] See, e.g., Jeff Sistrunk, NY Jury Awards $190 Million Over Asbestos Injuries, Death, Law360 (July 24, 2013), http://www.law360.com/articles/459738/ny-jury-awards-190m-over-asbestos-injuries-deaths (describing $190 million verdict against two boiler companies in lawsuits brought by five tradesmen who were exposed to asbestos); Gavin Broady, Crane, Others Owe $35 Million for Asbestos Death, Jury Says, Law360 (Mar. 4, 2013), http://www.law360.com/articles/420624/crane-others-owe-35m-for-asbestos-death-jury-says (describing $35 million verdict against Crane Co. and others in lawsuit on behalf of an asbestos remover who died of mesothelioma).

F.2d 694, 699-700 (4th Cir. 1989) (stating that "[a] good example of competent testimony was that of Dr. Francine F. Rabinovitz . . . [I]ndeed, we think the district court would have been quite justified in accepting Dr. Rabinovitz's testimony, so appellants may not complain about the district court's arrival at a somewhat higher figure"); Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 725 (D. Del. 2005) ("Dr. Rabinovitz has had extensive experience in estimating liabilities on behalf of insurance companies; I am satisfied her testimony is not affected by pro-plaintiff bias.").

VI. GARLOCK'S PREPETITION ASBESTOS SETTLEMENTS ARE A FAIR PROXY FOR THE VALUE OF FUTURE MESOTHELIOMA CLAIMS

Garlock's argument from the inception of this case has been that its prepetition asbestos settlements are not a fair proxy for the value of future claims. Specifically, as to the parties' current mesothelioma estimates, Garlock argues that none of its approximately 4,600 settlements during the 2005 to 2010 time frame were merits-based and therefore they cannot be used to estimate future allowed claims. Rather, Garlock maintains it settled to avoid defense costs,[91] and, in cases where it paid more than $250,000, Garlock contends such settlements were procured by fraud because plaintiffs misrepresented their exposure to other companies' products.[92] Overall, Garlock says no jury could ever properly find that Garlock has any asbestos liability for any mesothelioma claim.[93]

---

[91] See, e.g., Tr. 2533:13-19, 8/1/13 (Turlik) ("So if you asked me, we shouldn't have paid anything. But because of the litigation costs, we were forced to pay."); see also Debtors' Trial Brief, at 20 ("Garlock's settlements were not an admission of liability, but rather a financial decision primarily motivated by a desire to avoid defense costs. Simply put, it was cheaper for Garlock to settle claims than to pay lawyers and experts to demonstrate Garlock had no liability.").

[92] See, e.g., Tr. 3063:4-3064:4, 8/5/13 PM (Magee) (alleging that at least 72 of the 161 claims settled for over $250,000 in the five years prior to the petition date were "in that group where there were identified inconsistent exposure evidence between what was disclosed in the tort system and what we were able to determine based on the discovery in this case"); see also Debtors' Trial Brief, at 4 ("Discovery in this case has shown that in the cases where Garlock paid the most money, certain plaintiffs' firms *actively suppressed* evidence of their clients' exposures to asbestos-containing products for which bankrupts were

The record before the Court does not support Garlock's arguments.

A. Garlock's Prepetition Settlements Were Merits-Based.

EnPro's securities filings list the factors that determined the size of Garlock's asbestos settlements.[94] They do not list defense costs as the controlling factor in that merits-based analysis. In fact, in the specific section of EnPro's 10-Ks concerning the settlement factors, EnPro does not list defense costs at all:

> Settlements are made without any admission of liability. Settlement amounts vary depending upon a number of factors, including the jurisdiction where the action was brought, the nature and extent of the disease alleged and the associated medical evidence, the age and occupation of the plaintiff, the presence or absence of other possible causes of the plaintiff's alleged illness, alternative sources of payment available to the plaintiff, the availability of legal defenses, and whether the action is an individual one or part of a group.[95]

As discussed, Garlock's lawyers who were tasked with handling asbestos litigation similarly acknowledged that numerous merits-based factors were taken into account when Garlock settled cases, each of which had a bearing on trial risk.[96] They also explained that any case where a plaintiff could credibly allege exposure to asbestos in Garlock's products would likely survive summary judgment and, absent settlement, proceed to trial with its attendant

---

responsible") (emphasis in original), 16-17 (stating that the "tactics" of plaintiff firms "made it effectively impossible for Garlock to ever present plaintiffs' true exposure history to juries" and that this "was how plaintiff firms obtained the very highest settlements against Garlock").

[93] See generally Tr. 2533:20-22, 8/1/13 (Turlik) ("Q. It's your position that Garlock had zero liability; right? A. Correct."). See also Debtors' Trial Brief at 1-2 (stating that Garlock has "little or no responsibility for the claims that have been and will be asserted against it" and that "the products at issue here . . . did not contribute to causing anyone's mesothelioma").

[94] EnPro 2006 10-K, at 34, 46 (FCR-39).

[95] Id. at 34.

[96] See supra note 51.

risks.[97] At bottom, Garlock's "defense costs" theory cannot be reconciled with the fact that on the very rare instances it took a case to trial, it would also, on occasion, settle after the trial but before a verdict.[98] If Garlock never had any trial risk, and had spent all it needed to obtain a certain victory, there would be no reason to settle unless, of course, Garlock always has trial risk where credible allegations of exposure are made.

The FCR does not mean to suggest that when Garlock's lawyers settled without the need for a trial that they did not save on trial costs and that those savings are not something each party took into account. Common sense dictates the opposite. But it is not credible for Garlock to variously argue, as it does now, that it had no trial risk when confronted with a dying mesothelioma victim who had been exposed to asbestos fibers in Garlock's products; that all mesothelioma suits were nuisance suits; and that the amounts paid in settlement did not reflect the merits of the suits. Garlock's defense cost theory is squarely contradicted by Garlock's own witnesses and documents; it is a bucket that does not hold any water.

B. Garlock Was Not the Victim of Widespread Fraud.

On the fraud allegation, Garlock argues that plaintiffs, as a group, routinely denied exposure to asbestos in insulation and other non-Garlock products in the later 2000s, i.e., after most of the insulators had filed for bankruptcy.[99] The trial record did not present such a simple

[97] Tr. 3126:21-3127:4, 8/5/13 PM (Magee) (stating that it is "more difficult" to get a case "dismissed or kicked out on summary judgment" once "a plaintiff has alleged exposure to a Garlock product").

[98] Tr. 2304:13-2310:6, 8/1/13 (Turlik) (discussing Homa case, which Garlock settled for $250,000 at trial before a verdict was entered); Tr. 3001:22-3002:18, 8/5/13 AM (Bates) ("Q. Now, there are cases where Garlock settled after trial, right? A. Certainly.").

[99] Tr. 2251:24-2252:2, 7/31/13 (Turlik) ("Well, as these companies left the litigation, to some degree testimony concerning exposures to them left the litigation. We were not hearing their names nearly as much as we did in the 1990s."); Tr. 2522:20-2524:3, 8/1/13 (Turlik) (discussing alleged "trend" of plaintiffs no longer identifying exposure to other companies' products once those companies filed for bankruptcy); Tr. 4614:1-9, 8/22/13 (Glaspy) (alleging that certain plaintiff firms "withheld evidence in tort discovery of exposure to asbestos products of bankruptcy entities").

picture. Dr. Henshaw, Garlock's own witness, said he reviewed 547 deposition transcripts of current plaintiffs, which transcripts were listed in his report.[100] He testified that his review showed that plaintiffs frequently acknowledged exposure to other sources of asbestos.[101] This is not surprising given the industrial settings where Garlock's products were used and the well-known work practices of the most likely candidates for exposure to Garlock's products, e.g., pipefitters, boilermakers, and plumbers. The testimony at trial also showed that:

- Garlock was fully aware of such exposures when it settled cases at higher values after the insulators filed for bankruptcy;[102]
- Plaintiff lawyers would not accept pre-bankruptcy wave lower offers of settlement because those reflected a time when the solvent insulators were paying settlements at one hundred cents on the dollar and the trusts, while making payments, were paying and continue to pay claims at a significant discount;[103]

---

[100] Tr. 898:10-15, 7/25/13 AM (Henshaw) (stating that he reviewed 547 depositions).

[101] Tr. 901:16-19, 7/25/13 AM (Henshaw) ("Q. And in many of those depositions, the claimants or other people testified about people doing gasket work where they were also being exposed to thermal insulation, correct? A. That's correct."); Tr. 910:22-912:4, 7/25/13 AM (Henshaw) ("Q. . . . [F]or the 500-some, they freely admitted that oftentimes they would have been exposed to asbestos from thermal insulation during either their own activities or other people doing stuff around them, right?" A. Yes, sir."); see also Tr. 3133:22-3134:6, 8/5/13 PM (Magee) ("Q. . . . But do you agree with me that in most instances the plaintiffs acknowledged exposure to insulation -- put aside identification of product, but they acknowledged exposure to insulation. A. I would agree with you in most cases overall, particularly cases that were resolved at low values.").

[102] Tr. 2526:20-2528:10, 8/1/13 (Turlik) (discussing settling cases where Garlock knew plaintiffs were exposed to insulation and "overpaying" because Garlock did not receive an admission or affidavit as to exposure to specific insulation companies); Tr. 3133:3-9, 8/5/13 PM (Magee) ("Q. When you were entering into these settlements in the 2000s, you understood that plaintiffs would likely have claims against insulators that were bankrupt; right? A. Yes. Q. And that continued right up until 2010 when Garlock filed for bankruptcy. A. Yes."); Tr. 3136:3-7, 8/5/13 PM (Magee) ("Q. Now at the time that they were settling cases in the 2000s, they were fully aware that individuals would likely have claims against bankruptcy insulation companies; correct? A. Absolutely. That's the frustration here. Yes.").

[103] See generally Tr. 4666:24-4667:12, 8/22/13 (Glaspy) ("Q. So when you settle cases, you did talk about trust claims. A. Talked about the fact -- primarily from his point of view, that there was less money there.

- Garlock never once considered the other company exposure issue significant enough to address in any of its settlement agreements (whether by representations or otherwise);[104]
- Garlock did not bestir itself to ask for bankruptcy claims, ballots, and 2019s, which it argues are evidence of the fraud, except on a very limited and sporadic basis, thereby signaling their (ir)relevance to Garlock;[105] and
- Garlock's settlements only ever settled its several liability share, never the share of any other asbestos company.[106]

It is true that Garlock demonstrated at trial that some plaintiff firms first pursue cases against solvent defendants, settle, and then submit claims to bankruptcy trusts, rather than pursuing cases against solvent and insolvent defendants simultaneously. Garlock did not show, however, that plaintiffs are uniformly required to submit tort complaints and bankruptcy claims

---

There is less money. We're not getting any money from the trust claims. Oh, yes, you are. You're getting this kind of money from the trust claims. That was the constant negotiation, the constant issue that was brought up. They would deny they're receiving money from the trust."); Designated Deposition Testimony of Tim O'Reilly, dated Feb. 22, 2013, at 187:9-188:11 ("You would have that conversation and they say, well, but they're bankrupt and this case is still worth what it is worth and you're here so you're paying more.").

[104] Tr. 2528:11-2529:5, 8/1/13 (Turlik) ("Q. So you never said to any plaintiff's firm, look. We all know you worked around insulation. You don't remember who it is. But to the extent you file a claim, well, you know what? I'd like some money back from you. . . . A. We would have never gotten that."); Tr. 3136:14-25, 8/5/13 PM (Magee) ("Q. Now when you entered into these settlements . . . there's not a mention in any of them -- it doesn't say in a single one that I've seen: You represent to me you weren't exposed to these products; or I've asked you about these products and you don't remember. And therefore, if it turns out that you submit a claim, then I want a reduction in my amount of settlement. If it was so important to Garlock, why isn't it in the settlement agreements? A. If that were put in the settlement agreements, I suspect a settlement wouldn't have been reached."); Tr. 4666:10-14, 8/22/13 (Glaspy) ("Q. In the releases of which you were involved in negotiating thousands of mesothelioma claims against Garlock, did you ever put in any one of those releases any language, any representations about trust claims? A. No.").

[105] Id.

[106] Tr. 3140:7-11, 8/5/13 PM (Magee) ("Q. In the settlements you never resolved anybody else's liability, right, no other company's liability? A. In the -- no. Garlock's settlements resolved Garlock's liability.").

simultaneously.[107] Further, as Garlock's expert testified, the vast majority of plaintiffs, when asked, were truthful at their depositions about their exposure to asbestos from insulation and other products.[108] What the plaintiffs often did not recall were the specific names of those products.[109] That plaintiff testimony, together with the plaintiff's occupation, the sites where he worked, when he worked at those sites, and co-worker testimony, permitted Garlock to identify the insolvent asbestos companies that would be subject to claims and was available to Garlock's expert defense counsel to use at trial as applicable state law allowed.

Garlock also alleged at trial six specific instances of plaintiffs making declarations under oath to support bankruptcy claims that were inconsistent with discovery responses made in litigation to Garlock.[110] Garlock's allegations in this regard are serious, and should be taken seriously. The FCR does not minimize them. The question for the Court and the FCR, however, is whether these specific instances should serve as a basis for reducing an estimate based on data from thousands of settlements where no false declarations were made and the plaintiffs acknowledged they were exposed to asbestos dust from multiple sources. The FCR submits that

---

[107] Tr. 1173:4-9 (Brickman), 7/26/13 AM (noting that some, but not all, courts have case management orders that require a plaintiff to "list all of his trust claims"); Tr. 2333:25-2334:10 (Turlik), 8/1/13 ("Q . . . You're aware, are you not, that in most jurisdictions in the United States there is no Case Management Order requiring you to produce your trust plan? A. No. Most in jurisdictions there's not a heavy asbestos litigation. Q. In those where there are heavy, it is not uniform that there is this Case Management Order requiring the routine production of trust claims. A. Correct. I never said that it was more uniform. I said that it's occurring more and more.").

[108] Tr. 910:22-911:4, 7/25/13 AM (Henshaw) (agreeing that claimants "freely admitted that oftentimes they would have been exposed to asbestos from thermal insulation during either their own activities or other people doing stuff around them").

[109] Cf. Tr. 3477:9-3478:23, 8/7/13 AM (McClain) ("Garlock is one of the easiest defendants . . . to identify, because the[y] were a ubiquitous gasket company, and they had their name stamped on every gasket.").

[110] See, e.g., Tr. 2320:12-23, 8/1/13 (Turlik) (referring to six cases in which Garlock was "not given full disclosure" of "the plaintiff's exposure to thermal insulation products").

it should not. The elimination of the six specific settlements associated with Garlock's allegations from Garlock's database of approximately 4,600 settlements between 2005 and 2010 would not affect the estimate in any material way.[111] It would be inappropriate to reduce the recovery for all claimants because of the alleged bad acts of a few claimants. The best place to address the issues that Garlock raises concerning fraud are in individual cases, based on a complete record with all parties present, and in the trust distribution procedures going forward.

To be sure, the FCR accepts that Garlock's trial risk was lower when solvent insulator defendants were co-defendants in these cases, i.e., when plaintiffs made up their cases against Garlock and insulators simultaneously, relying, in large part, on the same information that was available to Garlock. Garlock's lawyers testified, credibly, that it was easier for them to defend cases against Garlock when they could point the finger at an insulator co-defendant and when there were more co-defendants in the courtroom.[112] That much is self-evident. But Garlock chose to file for bankruptcy, and estimate its asbestos claims, years after the insulators were

[111] Tr. 3970:7-3971:12, 8/8/13 PM (Peterson) (testifying that fifteen allegedly problematic cases identified by Garlock, including the six specific cases referenced above, represented "less than one-tenth of one percent of the claims," and that the law firms that submitted the fifteen claims represented "less than five percent" of all of Garlock's claims; "You don't say that all of the claims are suspect because you've found 15 bad apples. . . . [T]here's 12 of anything in New York City. And there's 15 of anything anywhere.").

[112] See Tr. 2402:20-2403:2, 8/1/13 (Turlik) ("Q. And your fundamental pitch to the Court is that back in the 1990s, when plaintiffs had to make the case against the Owens Cornings and the Pittsburgh Cornings, you could stand in the back and watch them make that case and then come forward at the end and point to Owens Corning and Pittsburgh Corning on the basis of the plaintiff's work and say, it was them not us. Right? A. That was the reality of what was happening."); Tr. 3113:23-3114:16, 8/5/13 PM (Magee) ("Q. Now you would agree with me that the mere fact that Garlock is sitting as one or two defendants left in the courtroom because all the old dusty companies are now in bankruptcy. Putting aside the issue about identification of products, would you agree with me that that mere fact has awkward pressure on the amount that Garlock is paying to resolve its cases because it's just one of three instead of being one of 30? A. Well, it depends. If that's the only fact you give me then, yeah, I would agree with that in bankruptcy.").

insolvent and not co-defendants. That is the reality that the parties must look to when estimating Garlock's mesothelioma claims now, not a time that is long past.

C. Garlock Had (and Has) Trial Risk.

The Court heard many days of testimony from many different expert witnesses on whether a plaintiff can, as a scientific matter, show injury from a Garlock products, which largely contained chrysotile asbestos. Garlock's own expert, Dr. Weill, perhaps summarized it best when he agreed that there is a reasonable debate in academic circles as to this issue.[113] Simply put, it is not credible for Garlock to argue that it has no trial risk, under the science and the law, in cases where a plaintiff credibly alleges exposure to asbestos fibers from Garlock's products.

VII. RESPONSES TO CRITICISMS LEVIED AGAINST DR. RABINOVITZ

Garlock, while acknowledging that Dr. Rabinovitz is a respected expert in her field, argued at trial that various adjustments should be made to her estimate: (i) defense costs and liquidated and disputed prepetition settlements should be excluded; (ii) information in the personal injury questionnaires ("PIQs") showing, for example, dismissal of claims, should be incorporated; (iii) she should not have assumed that all pending claims would be resolved in one year; (iv) adjustment should be made for age of claims at resolution; (v) different inflation and discount rates should be used; (vi) adjustment should be made for the fact that a lower percentage of pending claims were from plaintiff friendly states, like California and New York;

[113] Tr. 1108:1-4, 7/25/13 PM (Weill) ("Q. I think from your testimony this afternoon, you would agree that there is a debate in the academic circles about the issue of exposure to chrysotile and mesothelioma. A. Yes.").

and finally, (vii) the price Garlock will pay in the future will be lower as section 524(g) trust information becomes available.[114]

As to the first two adjustments Garlock alleges should be made – defense costs and prepetition settlements – the FCR has already provided an appropriate way to address those issues now, recognizing that they can be addressed later.[115] Further, Dr. Rabinovitz, in assuming that, on average, 46% of all present and future claims will receive zero payment in her base case (and 60% in her adjusted indemnity case), already factored in the dismissals and their equivalent that Garlock alleges it identified in the PIQ data but did not update in its own May 2011 database.[116] While it may not be the case that all pending claims will be paid in one year, Dr. Rabinovitz's simplifying assumption that they will be, rather than over a two or three year window as Garlock argues should be the case, has no significant impact on the estimate given applicable discount rates.[117] Dr. Rabinovitz also adjusts for the age of claims in her adjusted indemnity case, assuming claims over 6 years old will not be paid.[118] In fact, Garlock's data did not demonstrate that average resolution amounts necessarily decrease based on the age of the

[114] The FCR addressed Garlock's criticisms in detail in his Opposition to Debtors' Motion to Exclude or Strike Committee and FCR Estimation Expert Witness Opinions, dated Sept. 27, 2013 (Dkt. No. 3145).

[115] See supra pages 10-13.

[116] Tr. 4206:18-4207:2, 8/9/13 (Rabinovitz) ("[W]e're already assuming that close to half of the pending claims will not be paid anyway. And in the adjusted indemnity case, where we took account of the hypothesis that the longer claims have been sitting without being resolved, the lower the likelihood that they will be resolved. We've assumed 60 percent of the pending claims will not be paid."); Rabinovitz Demonstrative PowerPoint, at 27 (FCR-42).

[117] Tr. 4205:4-4206:8, 8/9/13 (Rabinovitz) ("So we re-ran this and it has no -- I mean I think Dr. Bates says this is significant, and it's about two percent. So, yeah, we made a simplifying assumption, but it's not a big deal.").

[118] Tr. 4170:17-4172:7, 8/9/13 (Rabinovitz) (explaining the adjustments in her adjusted indemnity case).

claims.[119] This is not surprising in light of the manner in which Garlock resolved mesothelioma claims in block settlements. On inflation rates, Dr. Rabinovitz used a lower rate than Garlock, to Garlock's benefit.[120] The discount rate she used was drawn directly from public treasury yield data, not CBO forecasts, and it was directly aligned with the predicted claims occurrence, upon which both she and Dr. Bates agree – namely that the majority of claims will be made in 10 years or less.[121] Dr. Rabinovitz believes it would be an error to adjust her estimate by reference to the jurisdiction of pending claims.[122] The averages she relies on are drawn from over 8,600 claims and the plaintiff firms have shown an ability to quickly change venue focus and bring claims in other so-called plaintiff-friendly jurisdictions.[123] Last, as noted, the testimony at trial showed that Garlock was aware of the availability of section 524(g) trusts when settling cases and when preparing its own internal estimates.[124] Thus, Garlock already priced in that reality when it

---

[119] Tr. 4207:6-9, 8/9/13 (Rabinovitz) ("[I]f you look at the distribution of closed and open claims by years pending, from the actual data they're remarkably similar.").

[120] Tr. 4196:23-4197:3, 8/9/13 (Rabinovitz) ("Q. Now Dr. Rabinovitz, your inflation rate is lower than Dr. Bates; right? A. Yes. Q. If you used a higher inflation rate, your number would be bigger wouldn't it? A. Yes."); Tr. 1357:21-1358:6, 7/26/13 PM (Radecki) ("Q. And the rate that [Dr. Bates] used actually was greater than yours, correct? It is greater than mine, yes, it is. . . . Q. And that actually would make the future claims bigger, right? A. Higher inflation rate would make the claims larger, yes.").

[121] Tr. 4197:7-24, 8/9/13 (Rabinovitz) (confirming that the discount rate "reflects the distribution of the stream [of] claims in terms of the majority of the claims falling within the ten-year window"); Tr. 1349:19-1350:18, 7/26/13 PM (Radecki) (explaining selection of discount rate, including the use of the yield curve of U.S. Treasury securities, which "are usually considered the gold standard of risk-free securities"); Tr. 1351:7-1352:6, 7/26/13 PM (Radecki) ("Approximately 60 percent of the claims all end up before the weighted average life year."); Tr. 1360:23-25, 7/26/13 PM (Radecki) (explain that Dr. Bates' "claims distribution is nearly identical" to that of Dr. Rabinovitz).

[122] Tr. 4208:9-4209:15, 8/9/13 (Rabinovitz) (explaining that it would be an error to adjust for jurisdiction because, among other reasons, the claims move).

[123] Id.; Rabinovitz Demonstrative PowerPoint, at 44 (FCR-42).

[124] Tr. 3122:3-5, 8/5/13 PM (Magee) (confirming that Garlock considered payments from other companies and trusts when settling cases); Tr. 3146:18-3148:2, 8/5/13 PM (Magee) (same).

settled 99.7% of its cases and paid, on average, $39,400 to resolve mesothelioma claims in the five years before its bankruptcy.

VII. CONCLUSION

For the foregoing reasons, the FCR respectfully requests that the Court estimate, on a net present value basis, allowed present and future mesothelioma claims against Garlock, exclusive of defense and administrative costs and liquidated and disputed settlements, at a number no less than $949 million.

Dated: November 1, 2013

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Jonathan P. Guy

Jonathan P. Guy
Kathleen A. Orr
David B. Smith
1152 15th Street, NW
Washington, DC 20005
Telephone: (202) 339-8400
Email: jguy@orrick.com
korr@orrick.com
dsmith@orrick.com

-and-

A. Cotten Wright (State Bar No. 28162)
Grier Furr & Crisp, PA
101 North Tryon Street, Suite 1240
Charlotte, NC 28246
Telephone: (704) 375-3720
Email: cwright@grierlaw.com

Counsel for Joseph W. Grier, III, Future Asbestos Claimants' Representative